MICHIGAN SUPREME COURT

Office of Public Information

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**DOES GUN HAVE TO BE WORKING TO SUPPORT FIREARMS CHARGE? MICHIGAN SUPREME COURT TO CONSIDER OPERABILITY DEFENSE IN ORAL ARGUMENTS**

LANSING, MI, January 9, 2006 – If a felon's gun was broken when he was arrested, can he be convicted of being in possession of a firearm? That is one of the questions the Michigan Supreme Court will consider during oral arguments next week.

In *People v Peals*, the defendant was discovered with a handgun during a police stop. He was convicted of being a felon in possession of a firearm and of felony-firearm. But he argues that, since the gun was broken and missing several parts at the time of the stop, the firearms charges were improper. The prosecution contends – and the Michigan Court of Appeals has agreed – that prosecutors were not required to show that the gun was operable when the defendant was found with the gun.

Also before the Court is *Grimes v Department of Transportation*, in which a quadriplegic accident victim seeks to sue the state for its alleged failure to maintain a portion of the highway shoulder on I-75. The driver who collided with the plaintiffs' vehicle claimed that he lost control of his car due to a drop between the paved and gravel sections of the shoulder. Although governmental immunity bars a number of lawsuits against the state, a governmental agency having jurisdiction over a highway can be sued if it does not "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." At issue is whether the shoulder is intended for vehicular travel, placing the plaintiffs' suit within the highway exception to governmental immunity.

The Court will also hear arguments as to whether carboxy THC – a natural byproduct of THC, the pharmacological component of marijuana – is a schedule 1 controlled substance under the Michigan Motor Vehicle Code. In *People v Derror* and *People v Kurts*, the defendants were charged with driving while having a schedule 1 controlled substance in their bodies. The defendants successfully argued to the Michigan Court of Appeals that carboxy THC is not a schedule 1 controlled substance, although the appellate court indicated that the presence of carboxy THC could be used as evidence that the defendants had THC in their blood while driving.

The remaining 12 cases involve issues of contract, criminal, constitutional, governmental immunity, paternity, insurance, tort, no-fault, and worker's compensation law.

Court will be held on **January 10, 11 and 12.** Court will convene at **9:30 a.m.** each day. The Court will hear oral arguments in its courtroom on the sixth floor of the Michigan Hall of Justice in Lansing.

(*Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available on the Supreme Court's website at* http://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm. *For further details about the cases, please contact the attorneys.*)

**Tuesday, January 10**
***Morning Session***

**GRIMES v DEPARTMENT OF TRANSPORTATION (case no. 127901)**
**Attorney for plaintiffs Michael and Tamara Grimes**: Gary W. Caravas/(586) 791-7046
**Attorney for defendant Michigan Department of Transportation**: Vincent J. Leone/(517) 373-0626
**Trial court**: Court of Claims
**At issue**: A governmental agency having jurisdiction over a highway has a duty to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). Is a highway shoulder part of the roadway designed for vehicular travel, thus making a road authority liable in tort for failing to maintain the shoulder portion of the roadway?
**Background**: Alan Thisse was traveling north on I-75 when his vehicle left the roadway and moved onto the shoulder. The shoulder was comprised of both a paved area and a gravel portion. Thisse claimed that an uneven drop between the paved and gravel sections of the shoulder caused him to lose control of his vehicle; he crossed three lanes of the highway, striking the vehicle in which Michael and Tamara Grimes were traveling. Michael Grimes' injuries left him a quadriplegic, paralyzed from the chest down. The Grimeses sued Thisse and the Michigan Department of Transportation (MDOT). One of the plaintiffs' claims rests on the theory that MDOT was liable for Michael Grimes' injuries; the plaintiffs contend that MDOT failed to maintain the gravel shoulder so that it remained level with the paved shoulder that runs alongside it. MDOT responded that it was protected from liability by governmental immunity. The Court of Claims disagreed and ruled in the plaintiffs' favor. The court found that the expressway was designed with a shoulder that was intended for vehicular travel. Thus, the highway exception to governmental immunity, set forth in MCL 691.1402(1), permitted the case to go forward, the court found. The Court of Appeals affirmed the Court of Claims' ruling in an unpublished per curiam opinion. MDOT appeals.

**PEOPLE v PEALS (case no. 128376)**
**Prosecuting attorney:** Jon P. Wojtala/(313) 224-5796
**Attorney for defendant Darryl Peals**: Robert S. Tomak/(734) 207-7636
**Trial court**: Wayne County Circuit Court
**At issue**: The defendant, a felon, had a gun when the car he was in was stopped by police; the gun was broken and missing several parts. In light of the fact that the gun did not work, was he properly convicted of felony-firearm and being a felon in possession of a firearm?

**Background**: During a traffic stop, the police found a handgun in Darryl Peals' possession. The gun was broken and missing parts. Peals told the police that he found the gun in a vacant lot and that it did not work; he said he intended to sell it for scrap. Peals, a felon, went to trial on two charges: felon in possession of a firearm (MCL 750.224f) and felony-firearm (MCL 750.227b). At trial, the jury heard the testimony of a firearms expert, who explained that the handgun was not operable, but that it could be made to fire one shot if certain parts were replaced. The jury convicted Peals of both charges. Peals appealed to the Court of Appeals, but that court affirmed in an unpublished opinion, holding that neither charge required the prosecutor to prove that the firearm was currently operable. The defendant appeals.

**PEOPLE v DERROR (case no. 129269)**
**Prosecuting attorney:** Robert A. Cooney/(231) 922-4600
**Attorney for defendant Delores Marie Derror**: Christine A. Pagac/(313) 256-9833
**PEOPLE v KURTS (case no. 129364)**
**Prosecuting attorney:** Jerrold E. Schrotenboer/(517) 788-4283
**Attorney for defendant Dennis Wayne Kurts**: Jerry M. Engle/(517) 782-9459
**Trial courts**: Grand Traverse County Circuit Court (*Derror*) and Jackson County Circuit Court (*Kurts*)
**At issue**: Carboxy THC is a natural byproduct of THC, which is the pharmacological component of marijuana. Is carboxy THC a schedule 1 controlled substance under the Michigan Motor Vehicle Code? And in prosecuting a driver for causing death while operating a motor vehicle with "any amount" of a schedule 1 controlled substance in the driver's body, must the prosecutor prove beyond a reasonable doubt that the defendant knew that ingesting the controlled substance may cause intoxication?
**Background**: Delores Marie Derror's car crossed the center line and struck an oncoming vehicle, killing a woman and seriously injuring three children. After a deputy sheriff found five marijuana cigarettes in Derror's purse, Derror admitted that she had smoked marijuana. A provision of the Michigan Motor Vehicle Code (MCL 257.625(8)) states that a driver "shall not operate a vehicle … if the [driver] has in his or her body any amount of a controlled substance listed in schedule 1" of the public health code. Derror was charged with 1) operating a motor vehicle with any amount of a schedule 1 controlled substance in her body causing death, 2) operating a motor vehicle with any amount of a schedule 1 controlled substance in her body causing serious injury, and 3) possession of marijuana. Blood samples taken from Derror contained carboxy THC, which is the metabolite of THC, the pharmacological component of marijuana. The trial court ruled that carboxy THC is not a schedule 1 controlled substance for purposes of MCL 257.625(8), but that evidence of carboxy THC could be used to establish that THC was present in Derror's blood when she was driving. The prosecutor appealed; the Court of Appeals granted leave to appeal and consolidated the Derror case with a similar prosecutor appeal involving another case, *People v Kurts*. Kurts, who was stopped for driving erratically, admitted to the police that he had recently smoked marijuana. Blood test results showed carboxy THC in Kurts' body. The charges against Kurts included operating a motor vehicle with any amount of a schedule 1 controlled substance in his body. The trial court dismissed the controlled substance charge, concluding that carboxy THC was not a controlled substance and that there was insufficient evidence that Kurts had a controlled substance in his body when he was driving. In a consolidated published opinion, the Court of Appeals affirmed the trial courts' rulings in both *Derror* and *Kurts*. Carboxy THC is not a controlled substance in itself, the Court of Appeals

stated. But the appeals court also held that there was sufficient evidence to go to the jury on whether Derror and Kurts had THC in their systems when operating their motor vehicles. Accordingly, the Court of Appeals reinstated the controlled substance charge against Kurts. The prosecutors appeal.

***Afternoon Session***

**MACLACHLAN v CAPITAL AREA TRANSPORTATION AUTHORITY, et al. (case no. 128131)**
**Attorney for plaintiff Kevin MacLachlan, Personal Representative of the Estate of David MacLachlan, Deceased**: Lawrence P. Nolan/(517) 663-3306
**Attorney for defendant City of Lansing**: Christine D. Oldani/(313) 983-4796
**Trial court**: Ingham County Circuit Court
**At issue**: The highway exception to governmental immunity, found in MCL 691.1402(1), states that a governmental entity's responsibility for maintaining highways extends "only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel." In this case, the city's employees plowed the streets in such a way that a wall of snow and ice accumulated near a bus stop, effectively preventing a passenger leaving the bus from reaching the sidewalk. Is the city liable under the highway exception to governmental immunity? Is snow and ice that is piled on the side of a roadway a "defect of the improved portion of the highway" within the meaning of MCL 691.1402(1)?
**Background**: In the days preceding the fatal car-pedestrian accident in this case, several snowstorms deposited large amounts of snow in the Lansing area. David MacLachlan was a regular Capital Area Transportation Authority (CATA) passenger who suffered from mental and physical disabilities. He was dropped off at a Pennsylvania Avenue bus stop where the accumulation of snow and ice from plowing had created a wall approximately three to four feet high, effectively blocking access to the sidewalk. MacLachlan began walking in the roadway and was struck by a motorist; MacLachlan died two days later. Kevin MacLachlan, as personal representative of David MacLachlan's estate, sued CATA, its bus driver, and the city of Lansing. MacLachlan alleged, in part, that the city of Lansing was liable under the highway exception to governmental immunity. The trial court disagreed and granted the city of Lansing's motion for summary disposition. The Court of Appeals reversed in an unpublished opinion and remanded for further proceedings. The Court of Appeals found that the city could be held liable under the highway exception because the wall of snow and ice was an unnatural accumulation. A jury could find that the creation of a three-to-four-foot wall of snow and ice when the street was plowed introduced a new element of danger not previously present and thus created an obstacle to travel, the Court of Appeals added. The city of Lansing appeals.

**PITTS v BEAM (case no. 128374)**
**Attorney for plaintiff Charles Pitts**: Maureen Martin Caster/(810) 233-0484
**Attorney for defendant Susan Beam**: Debra F. Donlan/(810) 767-5556
**Trial court**: Genesee County Circuit Court
**At issue**: A putative father does not have standing under the Paternity Act to establish the paternity of a child born while the mother was legally married to another man, when there has been no prior determination that the mother's husband is not the child's father. In this case, the

plaintiff filed a complaint seeking a filiation order to establish that he was the child's father. In his pleadings, the plaintiff represented that the mother was not married when the child was conceived or born, when in fact, the mother had been legally married to another man. The plaintiff did obtain a filiation order but, more than a year after it was issued, the mother moved to set it aside, arguing that the plaintiff did not have standing to obtain it and that the order was void. Under these circumstances, is the filiation order invalid because there was no prior determination that the child was not the product of the mother's marriage to another man? Was the mother required, under Michigan Court Rule (MCR) 2.612(C)(2), to challenge the order within one year of its issuance?

**Background**: While Susan Beam was married to George Beam, she had a sexual relationship with Charles Pitts; she became pregnant and gave birth to a child. While the child's original birth certificate states that her last name is Pitts, the certificate identifies George Beam, who died eight days after the child's birth, as her father. Pitts asserts that for nearly two years after the child's birth, he and the child shared a close father-daughter relationship. Pitts eventually filed a paternity complaint, seeking a declaration that he was the child's father. In his complaint, Pitts represented – inaccurately – that Beam was not married when the child was conceived or born. Beam did not answer this complaint, and the court entered a default order of filiation establishing Pitts' paternity over the child. Beam moved to Pennsylvania soon after, taking the child with her. Pitts then sought custody of the child, initiating additional proceedings in Michigan courts. Beam again did not respond to the litigation, and the court entered a default order granting Pitts custody. More than a year later, Pitts located Beam and the child in Florida; he obtained an order allowing him to take custody of the child and return her to Michigan. Beam filed a motion asking the court that issued the filiation order to rescind it. The court denied the motion, but returned the child to Beam pending an evidentiary hearing on the custody dispute. Beam appealed to the Court of Appeals, arguing that Pitts did not have standing to seek an order of filiation because there had been no prior determination, as required by the Paternity Act, that the child was not an issue of her marriage with George Beam. She claimed that the order of filiation was void. The Court of Appeals agreed and issued a peremptory order directing the trial court to set aside the order of filiation. Pitts appeals, arguing in part that Beam failed to challenge either the filiation order or the paternity complaint within one year, as required by MCR 2.612.

**PEOPLE v FRANCISCO (case no. 129035)**

**Prosecuting attorney:** Robert C. Williams/(248) 858-5230

**Attorney for defendant Charles Wayne Francisco**: Anne M. Yantus/(313) 256-9833

**Trial court**: Oakland County Circuit Court

**At issue**: In sentencing criminal defendants, trial courts use statutory "offense variables," which assign a number of points based on various factors in the crime; the number of points is used to determine the length of the sentence. Did the trial court properly score OV 9 (number of victims) and/or OV 13 (continuing pattern of criminal behavior)? Was *People v McDaniel*, 256 Mich App 165, 172-173 (2003), correct in deciding that OV 13 may be scored based on three or more felonies committed in any five-year period, even if that period does not include the sentencing offense? Is resentencing unnecessary if the minimum sentence imposed was within the correct guidelines sentence range? Did the trial court conduct inadequate voir dire of a witness who was a retired probation officer? Did the trial court abuse its discretion by permitting the defendant's jury to hear testimony offered in support of the codefendant's case?

**Background**: The prosecution contends that, on April 4, 2003, Charles Francisco and his nephew, Chris Bernier, Jr., broke into Joanne Ortiz's mobile home wearing masks, gloves and dark clothing. Ortiz and three other women were in the home at the time. One of the two men was holding a handgun, and threatened to kill the victims if they did not cooperate. The men then stole two purses and fled. Francisco and Bernier were arrested and charged with first-degree home invasion. They were tried together, but before separate juries. Bernier testified on his own behalf and denied participating in the crime. The court instructed the jurors to consider only the testimony regarding the defendant whose case they were deciding. Both Francisco and Bernier were found guilty. As a third habitual felon, Francisco was sentenced to eight and a half to 40 years in prison. He appealed, arguing that the trial court conducted an inadequate voir dire of a retired probation officer, who served on the jury and who had previously worked in the court where Francisco was tried. Francisco also argued that the trial court erred by allowing his jury to hear Bernier's testimony and the other testimony of the witnesses involved in Bernier's trial. He also contended that he was entitled to resentencing because the trial court assessed points against him for OV 9 and OV 13. The Court of Appeals affirmed the trial court in an unpublished opinion. Francisco appeals.

**Wednesday, January 11**
***Morning Session***

**PEOPLE v LEWIS (case no. 127261)**
**Prosecuting attorney:** Gary A. Moore/(616) 632-6694
**Attorney for defendant Patrick Lewis (a/k/a Tony Griggs)**: Peter J. Ellenson/(248) 945-8000
**Trial court**: Kent County Circuit Court
**At issue**: Is the defendant entitled to a new trial because defense counsel was constitutionally ineffective? Was the defendant denied his constitutional right to an impartial jury drawn from a fair cross section of the community as a result of the Kent County jury selection process? Is the defendant entitled to a new trial because a partly inaudible tape recording and a transcript of a conversation between the defendant and a female drug dealer acquaintance were admitted into evidence?
**Background**: Patrick Lewis was arrested for the shooting death of David Franklin, which allegedly occurred as the result of a drug-related dispute. The jury acquitted Lewis of first-degree premeditated murder, but convicted him of second-degree murder, carrying a concealed weapon, and felony-firearm. Lewis was sentenced to terms of 35 to 55 years for the murder, three to five years for the concealed weapon conviction, and two years for the felony-firearm offense. Lewis' appellate counsel moved for a hearing to explore Lewis' claim that his trial counsel provided ineffective assistance during trial. Lewis alleged that his trial attorney conducted no investigation, interviewed no witnesses, subpoenaed no witnesses, failed to lodge necessary objections, and failed to communicate with him. As a result, his trial attorney failed to perform at a level of reasonable competence, Lewis contended. The trial court held a hearing, but determined that Lewis received constitutionally adequate representation from his attorney; the court denied Lewis' motion for a new trial. The court also rejected Lewis' claim that the jury selection process in Kent County did not permit selection of a jury of his peers. Lewis then appealed to the Court of Appeals, raising these issues and also challenging the trial court's admission of a tape recording of a conversation between Lewis and a female drug dealer acquaintance; he objected to the many inaudible portions of the recording and to the accuracy of

the transcript prepared by the investigating detective. The Court of Appeals affirmed the lower court's ruling in a 2-1 unpublished opinion. Lewis appeals.

**HEIKKILA v NORTH STAR TRUCKING, INC., et al. (case nos. 127780, 127823, 127836)**
**Attorney for plaintiff Beverly Heikkila, Personal Representative of the Estate of Sheri L. Williams**: Tammy J. Reiss/(248) 355-5555
**Attorney for defendant North Star Steel Company**: Stuart H. Teger/(313) 465-7576
**Attorney for defendant International Mill Service, Inc.**: Robert G. Kamenec/(248) 901-4068
**Attorney for defendants Marc Rolland Sevigny and J.R. Phillips Trucking, Ltd.**: Richard E. Holmes/(313) 446-5522
**Trial court**: Monroe County Circuit Court
**At issue**: An object was thrown from the tires of a truck that had just left a steel mill, killing the plaintiff's decedent. The plaintiff's theory is that the object was a chunk of slag that became imbedded between the truck's wheels while the truck was in the mill. Did the plaintiff establish duty and causation against the various defendants?
**Background**: Sheri Williams was driving east when a westbound truck passed her in the opposite direction. The truck had recently left the North Star Steel mill. As the two vehicles passed each other, an object went through Williams' windshield, hit her in the head, and exited through her rear window. Williams died from her injuries shortly thereafter. Her personal representative sued the truck driver, Marc Sevigny;, J.R. Phillips Trucking, Ltd., the owner of the truck; North Star Steel Company, the owner of the steel mill; and International Mill Service, a contractor in charge of slag-hauling at the steel mill. When discovery was completed, the trial court granted summary disposition in favor of the defendants. The plaintiff had failed to present evidence that the defendants' actions were the proximate cause of Williams' death, the trial court found. In addition, because the harm Williams suffered was not foreseeable, the plaintiff had failed to show that defendants International Mill Service, Sevigny, and Phillips Trucking owed a duty to Williams, the court stated. The trial court also held that three of the plaintiff's proffered experts were unqualified to testify. In a split unpublished decision, the Court of Appeals majority reversed the trial court's grant of summary disposition, holding that the plaintiff created a sufficient question of fact regarding causation and duty to withstand the defendants' motion for summary disposition. The defendants appeal.

**NATIONAL WINE & SPIRITS, INC., et al. v STATE OF MICHIGAN, et al. (case no. 126121)**
**Attorney for plaintiffs National Wine & Spirits, Inc., NWS Michigan, Inc., and National Wine & Spirits, L.L.C.**: Louis B. Reinwasser/(517) 487-2070
**Attorney for defendant State of Michigan**: Howard E. Goldberg/(248) 888-8800
**Attorney for intervenor defendant Michigan Beer & Wine Wholesalers Association**: Anthony S. Kogut/(517) 351-6200
**Trial court**: Ingham County Circuit Court
**At issue**: MCL 436.1205(3) prohibits an "authorized distribution agent" (i.e. wholesaler of liquor) from competing, or "dualing," with a wholesaler of wine, unless the liquor wholesaler was "dualing" in wine before September 24, 1996. Does this statute violate the Commerce Clause of the U.S. Constitution? Does it violate the Equal Protection Clause of either the federal or Michigan constitutions?
**Background**: The plaintiffs challenge a Michigan statute, MCL 436.1205(3), which prevents liquor wholesalers, or authorized distribution agents (ADAs), from acting as wine wholesalers in

some wholesaling markets. There is an exception for ADAs that were "dualing," or competing with wine wholesalers, before September 24, 1996. Plaintiff National Wine & Spirits, Inc. (National Inc.) is an Indiana corporation. The other two plaintiffs are subsidiaries of National Inc.; NWS Michigan, Inc. is an authorized distribution agent of liquor (ADA) in Michigan, and National Wine & Spirits, L.L.C. is a licensed wine wholesaler in Michigan. NWS Michigan became an ADA after September 24, 1996. National Wine & Spirits also became a licensed wine wholesaler after September 24, 1996. The plaintiffs contended that, on September 24, 1996, only in-state companies were licensed as wine wholesalers. As a result, MCL 436.1205(3) "effectively prohibits all out of state companies from serving as both an ADA of spirits and a licensed wholesaler of wine in Michigan," they claimed. The statute violates the Equal Protection Clause because it creates two classes of ADAs and the classification is not rationally related to any legitimate government purpose, the plaintiffs argued. Finally, the plaintiffs claimed that the statute violates the Commerce Clause because the law effectively precludes out-of-state ADAs from dualing in Michigan, since no out-of-state ADAs were dualing as of September 24, 1996. The trial court granted summary disposition to the defendant state of Michigan and intervening defendant Michigan Beer & Wine Wholesalers Association, and dismissed both of the plaintiffs' constitutional claims. The Court of Appeals affirmed the lower court's ruling in an unpublished opinion. The plaintiffs appealed to the Michigan Supreme Court, which first held the case in abeyance for the United States Supreme Court's ruling in *Granholm v Heald*, 541 US 1062; 124 S Ct 2389; 158 L Ed 2d 962 (2004). After the U.S. Supreme Court decided *Granholm*, the Michigan Supreme Court directed the parties in this case to appear for oral argument.

**PEOPLE v WILLIAMS (case nos. 128294, 128533)**
**Prosecuting attorney:** Ana I. Quiroz/(313) 224-0981
**Attorney for defendant Joezell Williams II**: Neil J. Leithauser/(248) 545-2900
**Attorney for amicus curiae Prosecuting Attorneys Association of Michigan:** Timothy A. Baughman/(313) 224-5792
**Trial court**: Wayne County Circuit Court
**At issue**: In this case, the Court of Appeals followed the decision in *People v Bigelow*, 229 Mich App 218 (1998), in which a special conflict panel held that a conviction for the underlying felony must be vacated where defendant is convicted of first-degree murder based on alternative theories of felony-murder and premeditated murder. The prosecutor appeals, questioning whether *Bigelow* was correctly decided. The defendant also appeals, arguing that the prosecutor committed misconduct. The defendant also contends that evidence was seized in violation of his Fourth Amendment rights and that he was convicted and sentenced in violation of his right to be free from double jeopardy.
**Background**: Following a four-day trial, Joezell Williams was convicted of first-degree premeditated murder, first-degree felony murder, larceny from a person, mutilation of a dead body, possession of a firearm by a felon, and felony-firearm. He was sentenced to mandatory nonparolable life imprisonment on alternate theories of first-degree premeditated murder and first-degree felony murder. Williams was also sentenced as a third habitual offender to concurrent terms of 76 to 240 months' imprisonment for larceny from a person and mutilation of a dead body. In addition, he received a three-to-10-year sentence for being a felon in possession of a firearm and the mandatory consecutive two-year sentence for felony-firearm. Williams appealed to the Court of Appeals. He argued that his convictions for felony-murder and the underlying felony of larceny – in addition to premeditated murder – violated the constitutional

prohibition against double jeopardy. He also contended that the prosecutor engaged in misconduct and that evidence obtained from a search of his bedroom should have been suppressed. In a published opinion, the Court of Appeals majority agreed that the convictions for felony-murder and larceny from a person violated his right to be free from double jeopardy; the court vacated the larceny conviction and sentence. The Court of Appeals then affirmed Williams' murder conviction, based on alternative theories of premeditated murder and felony murder, and denied the other relief Williams had requested. The prosecutor appeals the Court of Appeals' decision to vacate the larceny conviction and sentence. Williams appeals the Court of Appeals' resolution of the other issues.

***Afternoon Session***

**JAMES, et al. v AUTO LAB DIAGNOSTICS & TUNE UP CENTERS, et al. (case no. 128355)**
**Attorney for plaintiff Mark P. James**: Michael W. Podein/(616) 447-7000
**Attorney for intervenor plaintiff Auto-Owners Insurance Company**: Daniel S. Saylor/(313) 446-5520
**Attorney for defendants Auto Lab Diagnostics & Tune Up Centers and Farmers Insurance Exchange**: Daryl C. Royal/(313) 730-0055
**Attorney for defendant Second Injury Fund, Permanent & Total Disability Provisions:** Gerald M. Marcinkoski/(248) 433-1414
**Attorney for amicus curiae Liberty Mutual Insurance Company:** Martin L. Critchell/(248) 593-2450
**Tribunal**: Worker's Compensation Appellate Commission
**At issue**: Did the plaintiff's injury, which occurred on the way to a seminar, arise out of and in the course of his employment so that he is entitled to worker's compensation benefits? If the plaintiff did suffer a work-related injury, are the defendants liable for paying an attorney fee on top of the amount they must pay to the plaintiff's no-fault insurance company to reimburse it for the plaintiff's medical expenses?
**Background**: Mark James, an auto mechanic employed by Auto Lab Diagnostics & Tune Up Centers in Coldwater, was severely injured in an automobile accident on his way to a seminar in Grand Rapids, where he was going to learn additional automotive diagnostic skills. James testified that the seminar was not a mandatory job requirement and that he could have declined his employer's offer to send him to the seminar without any adverse job consequences. James filed a worker's compensation claim. But defendants Auto Lab Diagnostics and Farmers Insurance Exchange did not agree that he was entitled to worker's compensation benefits and rejected James' claim. James did obtain no-fault insurance benefits from intervening plaintiff Auto-Owners Insurance Company, which paid wage loss and medical benefits. Both James and Auto-Owners filed separate applications for a hearing with the Worker's Compensation Agency. James sought worker's compensation benefits from the defendants; Auto-Owners sought reimbursement from the defendants for the payments that it had made to James. A worker's compensation magistrate found that James' injury arose out of and in the course of his employment. The magistrate therefore awarded benefits to James and ordered that the defendants reimburse Auto-Owners for the medical expenses and wage loss payments. The magistrate also ordered the defendants to pay Auto-Owners a penalty attorney fee on top of the reimbursed amounts. The defendants appealed to the Worker's Compensation Appellate Commission, which modified the award to delete the attorney fee on the wage loss reimbursement to Auto-Owners,

but otherwise affirmed the magistrate's decision. The Court of Appeals denied the defendants' application for leave to appeal. The defendants appeal.

**Thursday, January 12**
***Morning Session Only***

**COOK v HARDY (case no. 128333)**
**Attorney for plaintiff Elizabeth A. Cook**: Michael A. Ross/(248) 362-3707
**Attorney for defendant Christopher W. Hardy**: Mary T. Nemeth/(313) 963-8200
**Trial court**: Ingham County Circuit Court
**At issue**: To bring an action for noneconomic tort damages under the no-fault insurance act, MCL 500.3135(1), a plaintiff must establish a "serious impairment of body function." The act defines "serious impairment of body function" as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). Did the plaintiff suffer a serious impairment of body function?
**Background**: Christopher Hardy struck college student Elizabeth Cook with his car, breaking her right leg. Cook's leg was placed in a cast at an emergency room, and she was given pain medication. Cook subsequently received a walking cast, which was removed six weeks after the accident. Soon after, Cook's doctor noted that she was walking without her leg brace, but was using a crutch. Although her doctor advised her that she no longer needed the crutch, Cook continued to use it for a few weeks. She then began resuming her normal activities, including skateboarding. She received no further medical treatment and has no residual impairment. Cook sued Hardy to recover noneconomic tort damages under the no-fault insurance act, alleging that three aspects of her life were affected by her injuries. First, she had to postpone taking a college class, which she claimed delayed her completion of her associates degree program. Second, Cook contended that she was unable to return to her job at a photo shop, because she feared that she would not be able to move around quickly if the shop became busy. Third, Cook claimed she could not engage in impact sports for at least six months after the accident, although no doctor imposed any such restriction. Cook asserted that she sustained these injuries in the accident and that her injuries constituted a serious impairment of body function. The trial court granted Hardy's motion for summary disposition and dismissed Cook's lawsuit. The judge focused on the duration of Cook's impairment and found that the limitations on Cook's ability to lead her normal life were self-imposed. In a 2-1 unpublished decision, the Court of Appeals reversed, concluding that Cook had suffered a serious impairment of body function. Hardy appeals.

**MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION FUND v FARMINGTON INSURANCE AGENCY, L.L.C., et al. (case no. 127834)**
**Attorney for plaintiff Michigan Tooling Association Workers Compensation Fund, Subrogee of Distel Tool & Machine Company**: James N. McNally/(248) 355-0300
**Attorney for defendant Farmington Insurance Agency, L.L.C.**: Michelle A. Thomas/(248) 353-4450
**Attorney for third-party defendants Employers Insurance of Wausau and Wausau Insurance Companies**: Larry W. Davidson/(248) 649-7800
**Trial court**: Oakland County Circuit Court

**At issue**: Does an insurance agency that issues a certificate of insurance to its principal owe a duty of care to other entities that may ultimately rely on the certificate? Was liability properly allocated in this case?

**Background**: Machinery Maintenance Specialists, Inc. (MMS) used Farmington Insurance Agency, L.L.C. to obtain a worker's compensation insurance policy from Employers Insurance of Wausau/Wausau Insurance Companies. MMS subsequently asked Farmington Insurance to issue a certificate of insurance that MMS intended to present to one of its customers, David Friedman, Inc., to reassure the customer that MMS had worker's compensation insurance. Farmington Insurance issued the certificate, not knowing that Wausau had canceled the worker's compensation insurance policy due to MMS's failure to make premium payments. The certificate of insurance addressed to David Friedman, Inc. was then provided to another MMS customer, Distel Tool & Machine Company. The job performed for David Friedman, Inc. was completed without incident, but one of MMS's employees was injured while working at Distel. Since MMS did not have worker's compensation insurance, Distel became liable for paying worker's compensation benefits to the injured employee. Those benefits were paid by Distel's worker's compensation insurer, Michigan Tooling Association Workers Compensation Fund. Michigan Tooling then sued MMS and Farmington Insurance, seeking reimbursement for the costs it incurred as a result of the injuries to MMS's employee. Farmington Insurance filed a third-party complaint against Wausau. Following a bench trial, the trial court entered a judgment in favor of Michigan Tooling against MMS in the amount of $130,000; the court also awarded Michigan Tooling $135,502.85 against Farmington Insurance, plus $35,825.00 in attorney fees and $3,225.00 in expert witness costs. The trial court entered a judgment of no cause of action in favor of Wausau on Farmington Insurance's third-party claim. The Court of Appeals affirmed in an unpublished per curiam opinion. Farmington Insurance appeals.

**GORE, et al. v FLAGSTAR BANK, FSB (case no. 127669)**

**Attorney for plaintiffs James O. Gore and Bobbie N. Gore**: James J. Vlasic/(248) 355-0300

**Attorney for defendant Flagstar Bank, FSB**: Keith C. Jablonski/(248) 645-9400

**Trial court**: Oakland County Circuit Court

**At issue**: The plaintiffs sought financing from the defendant bank to redeem a foreclosed farm. A bank employee told the plaintiffs that the farm's status would not prevent the bank from making the loan, and conditionally approved the loan. The bank then denied the loan due to the farm's status. Can the bank be held liable on a theory of promissory estoppel?

**Background**: After a foreclosure sale of their farm residence, James and Bobbie Gore sought financing from defendant Flagstar Bank to redeem the property. When James Gore told loan officer Paul O'Donnell that the property was a working farm of more than 53 acres that was in foreclosure, O'Donnell assured Gore that this would not be a problem. He then sent the plaintiffs a letter conditionally approving the loan. The plaintiffs proceeded to sell assets in preparation for closing, and did not continue to seek alternative financing. Shortly before the redemption period expired, Flagstar Bank declined to approve the loan because the property was in foreclosure and was a working farm of more than 10 acres. The plaintiffs were unable to obtain other financing and were unable to redeem their home. They sued Flagstar Bank for breach of contract and fraud, in addition to other claims. The Gores also sued the bank on a theory of promissory estoppel – in other words, the Gores claimed that the loan officer's commitment letter was a promise or commitment which bound the bank. A jury found that Flagstar Bank did not breach a written contract and was not liable for fraud, but that the bank was liable on the promissory estoppel

theory. The jury awarded the Gores $206,856 in damages, but the trial court granted Flagstar Bank's motion for judgment notwithstanding the verdict and entered judgment in the bank's favor. The plaintiffs appealed to the Court of Appeals, which reversed the trial court's ruling in an unpublished per curiam opinion and remanded the case to the trial court for reinstatement of the jury's award. Flagstar Bank appeals.

**VILLAGE OF LINCOLN v VIKING ENERGY OF LINCOLN, INC. (case no. 127144)**
**Attorney for plaintiff Village of Lincoln**: Robert C. Davis/(586) 726-1000
**Attorney for defendant Viking Energy of Lincoln, Inc.**: Susan K. Friedlaender/(248) 566-8448
**Trial court**: Alcona County Circuit Court
**At issue**: The plaintiff Village of Lincoln filed a lawsuit seeking to enforce a local ordinance. Does "public policy" prohibit defendant Viking Energy from challenging the manner in which the ordinance was enacted? Is the issue of whether the ordinance was properly enacted moot? Has Viking Energy abandoned the procedural challenge to the ordinance by failing to raise it pursuant to MCL 125.585(11)?
**Background**: Viking Energy of Lincoln, Inc. owns a state-permitted electrical generating facility in the Village of Lincoln. It only used wood fuel up until 1997, when the Michigan Department of Environmental Quality (MDEQ) granted Viking a permit to burn certain alternative fuels, including tire-derived fuel (TDF). Within days, the Village enacted Ordinance 96-2, which imposed setback and storage/stockpiling requirements for "major emitting facilities." The ordinance also "froze" the amounts and types of alternative fuels to be burned to those permitted by the state on the date the ordinance was enacted. Before and after enactment, Viking protested the ordinance and the manner of its adoption under Lincoln's Zoning Ordinance and City and Village Zoning Act. In 2000, the MDEQ granted a new permit which allowed Viking to burn more TDF but reduced its use of other alternative fuels. The Village insisted on compliance with Ordinance 96-2 and sued Viking for declaratory and injunctive relief, alleging that violation of the ordinance was a public nuisance. Both parties moved for summary disposition, and the Village sought a preliminary injunction. The trial court granted summary disposition to Viking, denied the Village's motions, and found that Ordinance 96-2 violated the due process and equal protection clauses of the United States and Michigan constitutions. The court did not address Viking's claim that the ordinance was improperly enacted, but rejected the Village's claim that "public policy" prohibited Viking's challenge to the ordinance. The Village appealed. In an unpublished per curiam opinion, the Court of Appeals affirmed the trial court's ruling that Ordinance 96-2, as applied, violated substantive due process. The Court of Appeals reversed the trial court's other rulings. Specifically, the Court of Appeals held that the setback and storage provisions of the ordinance did not violate due process, that there were no equal protection violations, and that it was error to hold that "public policy" did not bar challenges to 96-2's enactment. Viking appeals.

--MSC--